



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 254 OF 2016

TARMAL WIRE PRODUCTS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

ABERDARE STEEL & HARDWARE LTD.....DEFENDANT/RESPONDENT

RULING

1. The ruling relates to a notice of motion application dated 18th January 2017, brought under the provisions of; Order 2 rule 15(1)(c) and (d), Order 13 rule 2(Civil Procedure Rules), Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. The Applicant is seeking for orders;

(a) That the defendant's statement of defence dated 21st November 2016 and filed in court on 23rd November 2016, be struck out for being a sham and an abuse of the process of court since it is solely intended to prejudice, embarrass and/or delay the fair trial of the suit;

(b) That in the alternative, judgment on admission be entered in favour of the plaintiff against the defendant in the sum of Kshs. 21,221,177 with costs and interest as prayed in the plaint dated and filed in court on 30th June 2016;

(c) That costs of the application be borne by the defendant.

3. The application is premised on the grounds on the face of it and an affidavit of even date sworn by Ebrahim Ali Omar, an accountant with the plaintiff's company. He deposed that the parties herein have had a long trading relationship going back to the year 2005, during which period it supplied the defendant with steel and hardware products.

4. However, the claim in this suit is restricted to the goods sold and delivered between the years 2011 and 2012, as per the annexed copies of statement of accounts covering the period between 1st January 2010 to 5th December 2012, as well as delivery notes/invoices in respect of goods delivered between 3rd January 2011 and 13th September 2012.

5. That a total number of twenty (20) cheques with a combined value of Kshs. 12,711,755 were issued by the defendant in favour of the plaintiff in purported payment on account but they were dishonoured for lack of funds in the defendant's bank accounts. Consequently, the plaintiff's bank accounts were debited with bank charges and the defendant duly notified. The Applicant produced the said statements of accounts at pages 11 to 25 of its bundle of documents reflect the cost of all the goods supplied by the defendant during the transaction period.

6. It was argued that the defendant's allegation in the statement of defence dated 21st November 2016 and filed in court on 23rd November 2016, to the effect it replaced the bounced cheques by depositing cash amounts into the plaintiff's bank account, has no factual basis and is a mere fabrication given that the plaintiff has not attached the bank pay-in receipts to back up its claim.

7. The Applicant maintained that the goods were supplied to the defendant on credit terms and at no time did the defendant settle the full value of any single delivery, consequently, its allegation in the statement of defence that it used to pay cash for the goods supplied is untrue once again and is only intended to mislead the Honourable court. The goods supplied were duly acknowledged by the defendant as shown in delivery notes/invoices produced.

8. As such the Honourable court be pleased to strike out the defendant's statement of defence dated 21st November 2016 and filed in court on 23rd November 2016 and enter judgment on admission in favour of the Plaintiff in the sum of Kshs. 21,221,177 with costs and interest as prayed in the plaint

9. The Defendant (herein "the Respondent") filed a Replying affidavit and reiterated the averments in the statement of defence. Subsequently the Applicant filed submissions but the Respondent did not file any. The Applicant submitted that it is under a legal duty to prove its claim against the defendant, under Section 107 of the Evidence Act (Cap 80 of the Laws of Kenya), which states that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

10. That the Plaintiff has submitted documents relating to the entire transaction including copies of the twenty (20) cheques were dishonoured thus, the plaintiff has discharged the legal burden of proof cast upon it by Section 107 of the Evidence Act.

11. Consequently the burden under Section 109 of the Evidence Act, of disclaiming the liability shifted to the defendant to sufficiently prove how it settled its liability with the plaintiff, that is, to prove any payment it claims to have made to the plaintiff towards settlement of its liability.

12. It was submitted that the defence has the statement of defence dated 21st November 2016, and filed in court on 23rd November 2016, admits have traded with the plaintiff; received hardware materials from the plaintiff and claims to have made cash payments for the same and denies that any of its cheques were dishonoured; and if any of its cheques were dishonoured it replaced them with cash payments into the plaintiff's accounts at Bank of Africa or Fort Jesus Forex Bureau.

13. Yet the statement of defence was not accompanied by the documents enumerated under Order 7 rule 5 of the Civil Procedure Rules being a list of witnesses to be called at the hearing; written statements of its witnesses; and copies of the documents to be relied upon at trial. As such the defence constitutes general denial of liability and does not sufficiently respond to the plaintiff's claim. It is merely intended to delay an expeditious determination of the action hence an abuse of the process of court.

14. The Applicant relied on the cases of: *Muus Kenya Limited vs Jane MweuMilimani HCCC No. 499 of 2001*, where a defence was struck out for being a sham.

15. I have considered the pleadings as stated in the plaint filed herein dated 30th June 2016, witness statement by Ebrahim Ali Omar and the list of documents annexed thereto and I find that, there is a schedule of the twenty unpaid cheques tabulated at paragraph 6 of the plaintiff's witness statement totaling Kshs. 12,711,755. The witness has also provided copies of statements of accounts at page 11-25 of its bundle of documents showing the goods supplied to the defendant in the total sum of Kshs. 21,221,177. The copies of delivery notes and invoices are also provided at pages 26-69 of the bundle of plaintiff's documents. Similarly, the dishonoured cheques are found at pages 69-88. Finally a demand letter dated 18th March 2016 is provided at page 89 of the bundle demanding the said sum of Kshs. 21,221,177.

16. The defendant on its part filed a statement of defence dated 21st November 2016, denying the claim. There is no witness statement nor any documents attached thereto. However, the defendant admitted at paragraph (3) thereof that, it used to procure and receive hardware goods from the plaintiff but denied credit terms and that it used to pay cash for some of the goods supplied. It admitted receipt of goods in the year 2010 to 2012 but denied receipt of all the goods alleged in the statement of accounts.

17. That most of the delivery notes produced are not stamped meaning the goods were not supplied or delivered to the defendant as alleged. That the cheques referred to did not "bounce" and whenever a cheque bounced, the subject sum would be deposited directly in the plaintiff's account at Bank of Africa or Fort Jesus Forex Bureau, and that is why the plaintiff continued to supply the goods.

18. Having considered the pleadings, witness statements, the documents produced, I find that the plaintiff has adduced sufficient evidence to prove that it supplied the defendant with the goods in question and the same have not been paid for. Although the defendant's counsel submitted that the defence raises three issues being; whether the orders are authentic; proof of the delivery notes and the amount owed, but the defendant did not adduce a thread of evidence to rebut the plaintiff's averments. The law is clear that, he who alleges proves as provided for under Section 107 of the Evidence Act (Cap 80) Laws of Kenya which states and/or documents. I further find that, the plaintiff having produced the documents referred to herein in proof of its claim, the defendant had to rebut the same, to establish triable issues.

19. In the given circumstances, I find that the defence herein is a sham an abuse of the court process. I therefore allow the application herein in terms prayer (1) and although the Applicant did not expressly state upon striking out the defence judgment be entered the natural consequence of striking out a defence is entry of judgment. However the parties should be more clear in their prayers. I therefore enter Judgment in favour of the plaintiff/Applicant as prayed for in the plant but with interest at court rates, as the interest claimed herein is not proved, Interest shall accrue from the date of filing the suit to payment in full. The costs are awarded to the Applicant.

20. It is so ordered.

Dated and signed on 29th day of November 2019.

GRACE L NZIOKA

JUDGE

Delivered and signed this 11th day of December 2019

W. OKWANY

JUDGE

In the presence of:

No appearance for plaintiff/applicant

Mr. Masaki for Defendant/respondent

Dennis-----Court Assistant